In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation, COUNTRY CLUB ESTATES, a partnership, and BOULDIN DEVELOPMENT CORPORATION, a corporation,
Petitioners,

vs.

TAHOE REGIONAL PLANNING AGENCY et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 566 F.2d 1353. A previous opinion, withdrawn upon rehearing, is reported at 558 F.2d 928. These opinions are reproduced as Appendices A and C, respectively, to the petition for writ of certiorari. [A.P. 1-22; 25-57][1] The Court of Ap-

1. Petitioners will use the following abbreviations in this brief. Appendix: "A." Appendix to Petition for Writ of Certiorari: "A.P." Record: "R." References to the portion of the record generated in the District Court will be to the consecutive page numbers in the record transmitted to the Court of Appeals. References to the portion of the record generated in the Court of Appeals will name the document and cite the page to which the Court's attention is directed.

peals' order denying petitioners' petition for rehearing and the District Court's opinion are unreported. They are reproduced, respectively, as Appendices B and D to the petition for writ of certiorari. [A.P. 23-24, 58-62]

JURISDICTION

The judgment of the Court of Appeals was entered as of December 21, 1977. A petition for rehearing was denied as of January 30, 1978. The petition for certiorari was docketed March 21, 1978, and was granted June 5, 1978. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

Does the Eleventh Amendment provide immunity to every agency created by interstate compact without regard to the particular circumstances of each one's organization, powers, functions, financing, and other elements of its relationship with the participating states?

II

The Tahoe Regional Planning Agency is a separate legal entity and a political subdivision of California and Nevada, funded primarily by counties, governed by a body a majority of whose members are appointed by cities and counties, and empowered to perform functions such as land use regulation previously and traditionally performed by those cities and counties. Does the Eleventh Amendment provide immunity to the Tahoe Regional Planning Agency, merely because it was created by an interstate compact?

III

The Tahoe Regional Planning Compact created the Tahoe Regional Planning Agency as a bi-state agency and separate legal entity, termed it a political subdivision of the two compacting states, referred to actions in the federal courts involving the agency, and was subject to Congressional consent which provided that the compact was in no way to affect the powers or the applicability of the laws of the United States. Did the Tahoe Regional Planning Compact waive any Eleventh Amendment immunity that might otherwise have attached to that Agency?

IV

Do appointed members of the governing body of the Tahoe Regional Planning Agency, a political subdivision of California and Nevada, have *absolute* immunity from any claim for damages for acts infringing constitutionally protected rights, merely because those acts may be characterized as "legislative"?

STATUTES INVOLVED

The statutes involved are these:

1. Article I, § 10, cl. 3 of the Constitution of the United States, providing: "No state shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State. . . ."

2. The Eleventh Amendment to the Constitution of the United States, providing:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

3. The Tahoe Regional Planning Compact, California Government Code §§ 66800-66801 (West Supp. 1977); Nevada Revised Statutes §§ 277.190-277.230 (1973); Congressional consent granted, Act of December 18, 1969, Public Law No. 91-148, 83 Stat. 360. The text of the Compact, with additional consent provisions added by Congress, is contained in Pub. L. No. 91-148, reproduced verbatim as Appendix E to the Petition for Certiorari. [A.P. 63-80]

4. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, as codified in 42 U.S.C. § 1983, providing:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE[2]

This is an action against the Tahoe Regional Planning Agency, an agency created by a compact between California and Nevada approved by Congress, and against individual members of its governing body and its executive officer (the "individual defendants").[3] Petitioners allege

2. The case comes before this Court on review of a motion to dismiss the complaint. This statement of facts accordingly includes only (1) facts alleged in the complaint, (2) provisions of law contained in the Compact, and (3) proceedings in the courts below reflected in the record.

3. The States of California and Nevada, certain counties in the area, and others were also defendants in this case or in one of the three related cases consolidated with this one on appeal. Petitioners have raised no issues with respect to the dismissal of those other defendants and accordingly TRPA and the individual defendants are the only parties adverse to petitioners in this Court.

that the agency and the individual defendants have taken petitioners' property without just compensation and without due process of law.

In 1968 California and Nevada entered into the Tahoe Regional Planning Compact ("the Compact"). The purpose of the Compact was to regulate and control development in the Lake Tahoe Basin, a geographic region that lies partly in each state. See map, Appendix A. Cal. Gov't Code §§ 66800-66801 (West Supp. 1977); Nev. Rev. Stat. §§ 277.190-227.230 (1973). Congress consented to the Compact in 1969. Act of December 18, 1969, Pub. L. No. 91-148, 83 Stat. 360 (1969). [A.P. 63-80]

The Compact created a "separate legal entity" known as the Tahoe Regional Planning Agency ("TRPA"). [Compact, Art. III(a), A.P. 65] TRPA is deemed, for purposes of suit, to be a "political subdivision" of both states. [Compact, Art. VI(b), A.P. 75]. The Compact directed TRPA to adopt a regional plan providing for land use, transportation, conservation, recreation, public services and facilities, and similar matters in the Lake Tahoe Basin. [Compact, Art. V(b); A.P. 70-72] TRPA was empowered to adopt and enforce ordinances, rules, regulations, and policies on a number of subjects to effectuate the regional plan. [Compact, Art VI(a), A.P. 73-74]

TRPA has a governing board of ten members, none of whom are elected to it. Six are appointed by county and city governments in the area; two are appointed, respectively, by the governors of California and Nevada; and two are members by virtue of their offices in natural resources agencies of the states.[4] [Compact, Art. III(a), A.P. 65-66]

4. Each member appointed by a California county or city must be a member of the appointing city's or county's council or board of supervisors; the member appointed by each Nevada county,

The Compact provides for TRPA's funding to come principally from the five counties in the Lake Tahoe Basin. TRPA may assess the counties within the region up to a total of $150,000 each year and the California counties are authorized to levy local taxes to raise it. TRPA may also collect fees for services and accept gifts, donations, subventions, grants, and other financial aids and funds. [Compact, Art. VII(a), (b), and (d), A.P. 77] Apart from the expenses of each member of the governing body, which are to be met by the body he represents, all expenses incurred by the governing body in the course of exercising its powers are to be paid by TRPA out of its own funds. [Compact, Art. III(b), A.P. 66] Obligations contracted by the agency do not bind the states or any of their political subdivisions. [Compact, Art. VII(f), A.P. 78]

Petitioners Lake Country Estates and Country Club Estates own real property within what is now TRPA's jurisdiction. [A. 8, 13][5] In 1971, Lake Country submitted plans for development of the property to El Dorado County. The County approved them. Lake Country submitted the plans to

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however, need only be a resident of the appointing county. [Compact, Art. III(a), A.P. 65-66] The governing body also has a nonvoting member appointed by the President of the United States. Act of December 18, 1969, Pub. L. No. 91-148, § 3, 83 Stat. 360 [A.P. 79] TRPA also has an advisory planning commission of at least seventeen members appointed by the governing body. Ten are officers of local agencies designated in the Compact and at least four are lay residents of the region. [Compact, Art. III(h), A.P. 67-68]

5. Petitioner Bouldin Development Corporation is the beneficiary of a deed of trust on the Lake Country Estates property. [A. 8] The complaint was amended by stipulation to add Bouldin Development Corporation as a plaintiff on October 15, 1973. [R. 105-137] For convenience, petitioners Lake Country Estates, Country Club Estates, and, where appropriate, Bouldin Development Corporation, will be referred to collectively as "Lake Country."

TRPA's Advisory Planning Commission, which also approved them. [A. 8, 13]

On February 10, 1972, however, TRPA adopted its regional plan. The regional plan included a "Land Use Ordinance" ("LUO") (reproduced at R. 62-98). [A. 9, 13] Under the LUO Lake Country's land was classified as "General Forest" and "Conservation Reserve." [A. 9, 13] The LUO prohibited any development or use of property so classified for any purposes except hiking trails, camps, riding trails, forest management programs, fire lookouts, and the like. [R. 77-78, 87]

Lake Country again applied to TRPA for permission to develop the property. TRPA rejected the application and reclassified all of the property as "Conservation Reserve." This effectively prohibited development and any beneficial use of the property and destroyed any value of the property. [A. 9, 13-14] TRPA also announced its intention to acquire the property. [A. 9-10, 14]

On April 16, 1973, Lake Country filed a complaint in the United States District Court for the Eastern District of California against TRPA, El Dorado County, the States of California and Nevada,[6] and the individual defendants. [R. 1-28] Lake Country alleged that the defendants had taken the property without just compensation and without due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. [A. 5-6, 10, 15, 19, 20; R. 2, 7, 10, 12, 14-15, 15;] Similar claims were alleged under the Compact and the constitutions and laws of the States of Nevada and California. [A.

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6. Although the states were named as defendants they were never served in this action. They were before the Court of Appeals, however, as defendants in other actions with which this one was consolidated.

16-18; R. 12-14] Lake Country sought damages [A. 23-25; R. 18-19] and injunctive and declaratory relief. [A. 25-28; R. 19-22] Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343,[7] as well as 28 U.S.C. § 2201 and the court's pendent jurisdiction [A. 5-6; R. 2-3]

Defendants filed motions to dismiss this action and other actions brought by other property owners asserting similar claims. [R. 29-33, 99-101, 102-104, 139-41] On December 11, 1975, the District Court dismissed all of the cases. [A.P. 58-62; R. 630-34] Although it held that the complaints all "state[d] facts sufficient for a cause of action in inverse condemnation," it ruled that "an inverse condemnation action cannot be brought against TRPA" because it lacks the power of condemnation. [A.P. 59; R. 631] It therefore dismissed all the complaints against TRPA without leave to amend. [A.P. 60; R. 632] It dismissed claims against the individual defendants on the ground that "members of governmental bodies are immune from liability for damages arising out of their exercise of discretionary functions." [A.P. 61; R. 632] It also dismissed all other defendants. [A.P. 60-62; R. 632-33]

Lake Country appealed to the Ninth Circuit Court of Appeals [R. 635-37], where the case was consolidated with others involving TRPA. In its first opinion, issued on August 5, 1977, the Ninth Circuit reversed the District Court in part, holding that the complaint stated claims against TRPA for damages and for injunctive and declaratory

7. The District Court had jurisdiction under 28 U.S.C. § 1331 because each plaintiff's claim exceeded $10,000, exclusive of interest and costs, and arose under federal constitutional provisions and the federal law of the Compact. It had jurisdiction under 28 U.S.C. § 1343 because plaintiffs asserted claims under 42 U.S.C. § 1983 for violation of constitutional rights under color of state law.

relief under the due process clause of the Fifth Amendment.[8] [A.P. 34-35; 558 F.2d at 936] It affirmed dismissal of the States (but not TRPA) in the related actions on the basis of the Eleventh Amendment and dismissal of the County on other grounds. [A.P. 31-40; 558 F.2d at 938-41] With respect to Lake Country's damage claims against the individual defendants, the court held that the individual defendants were entitled to absolute immunity to the extent they were acting in a "legislative" capacity and qualified immunity to the extent they were acting in an "executive" capacity. [A.P. 45-49; 558 F.2d at 941-44]

TRPA petitioned for rehearing. On December 21, 1977, the Court of Appeals withdrew its August 5, 1977, opinion and issued a second opinion in its place. [A.P. 1-22; 558 F.2d 1353] In its second opinion the Court of Appeals ruled, for the first time and *sua sponte*, that TRPA is immune from suit under the Eleventh Amendment. [A.P. 6-9; 566 F.2d at 1359-60]

TRPA had never claimed such immunity at any stage. California and Nevada had vigorously denied in related actions that TRPA was an arm of either state or anything but a local governmental entity. [See A.P. 81-83; Brief of Appellee State of California, August 2, 1976, in No. 76-1608, *Layton-Tahoe Properties v. Tahoe Regional Planning Agency et al.*, pp. 7-9; Brief of Appellee State of Nevada, July 2, 1976, in No. 76-1608, *Layton-Tahoe Properties v. Tahoe Regional Planning Agency et al.*, p. 7] The Court of

8. The Court of Appeals held that petitioners stated no claim under the just compensation clause of the Fifth Amendment because TRPA did not have power to condemn the property. [A.P. 31; 558 F.2d at 936] In its second opinion it indicated that a claim was stated under the due process clause of the Fourteenth Amendment as well as of the Fifth Amendment, but that none was stated under the just compensation clause of either. [A.P. 4-6; 566 F.2d at 1358-59.]

Appeals itself had not suggested in its earlier opinion that TRPA was immune from suit. Nevertheless, on the basis of this Court's decision in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), the Court held that TRPA was immune from suit. It construed *Petty* to hold that "bi-state compacts . . . preserve Eleventh Amendment immunity for entities created under them." [A.P. 8; 566 F.2d at 1360] It also stated that even if *Petty* were not a binding decision, it "still would find immunity for the reasons set forth in the opinion of the Eighth Circuit. *Petty v. Tennessee-Missouri Bridge Comm'n*, 254 F.2d 857 (8th Cir. 1958)." [A.P. 8; 566 F.2d at 1360] The Court also held, in contrast to *Petty*, that California and Nevada had not waived TRPA's immunity by entering into the Compact. [A.P. 11-12; 566 F.2d at 1361-62] Accordingly, it dismissed TRPA as a defendant.

Thus the Court of Appeals held that in federal court property owners whose property has been taken by an agency such as TRPA can recover damages or other compensation or relief for the taking only against the officials of the agency. None of the other defendants, the states, the counties, or the agency itself, is accountable in damages for the taking in any federal court. Moreover, property owners can recover from those officials only to the extent they acted in an "executive" capacity in taking the property, and only if they can be shown to have acted in bad faith or to have departed from evenhanded enforcement of the regulations they enacted. Otherwise, even those officials have an "absolute" immunity, and no one is liable for the taking of the property.

SUMMARY OF ARGUMENT

Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959), did not decide that every interstate agency

has Eleventh Amendment immunity. An examination of the particular characteristics of each compact agency is required in order to determine its Eleventh Amendment status, just as for governmental bodies created by a single state.

Examination of TRPA shows that it is not an arm of the states entitled to Eleventh Amendment immunity. It is expressly a "separate legal entity" and a "political subdivision" of the states for purposes of suit. Its jurisdiction is local and its functions are local functions. Its governing body is made up largely of local officials and their actions are not subject to veto at the state level. TRPA's funding under the Compact is from local governments, and both the States and their political subdivisions are expressly insulated from its obligations.

Even if the agency were an arm of the states, moreover, the Compact waives any Eleventh Amendment immunity TRPA might otherwise have. The Compact contains a provision authorizing TRPA to be made a party to suits in the federal courts. Congress also attached a proviso reserving federal jurisdiction. In addition, this action is authorized by 42 U.S.C. § 1983, a statute enacted by Congress exercising its powers under Section 5 of the Fourteenth Amendment. Even if TRPA's asserted immunity had not been waived generally, therefore, TRPA has no immunity as to suits of this kind in which petitioners assert that they have been deprived of their constitutional rights in violation of the Fourteenth Amendment.

Finally, the Court of Appeals erred in according to the members of TRPA's governing body absolute immunity from damages for acts in a "legislative" capacity. The absolute immunity of members of Congress and state legislatures is a special privilege of those bodies mandated by

the speech and debate clauses of federal and state constitutions in order to preserve the separation of powers. Neither precedent nor policy supports extending absolute immunity to members of an appointed administrative body such as TRPA's governing body.

ARGUMENT

I. THE ELEVENTH AMENDMENT DOES NOT IMMUNIZE THE TAHOE REGIONAL PLANNING AGENCY FROM SUITS AGAINST IT IN THE FEDERAL COURTS.

A. The Applicability of the Eleventh Amendment to Interstate Agencies Must Be Decided on a Case-by-Case Basis Using the Same Standards Applied to Agencies Created by a Single State.

In its decision below, the Court of Appeals held that the Eleventh Amendment immunizes all bi-state and multi-state agencies created by interstate compacts from suit in the federal courts. [A.P. 7-8] Since TRPA is one of those agencies, the Court of Appeals dismissed Lake Country's action against it.

The Court of Appeals' categorical rule was based only on its reading of this Court's decision in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959). Lake Country submits that the Court of Appeals read into *Petty* a proposition for which it does not stand. Instead of the Ninth Circuit's *per se* rule, the status of compact entities under the Eleventh Amendment must be decided on a case-by-case basis, applying the same standards used by this Court to determine the status of intrastate bodies.

Petty was a negligence action brought under the Jones Act. The defendant was a bi-state corporation, created by compact, that operated a bridge and ferries across the

Mississippi River between Tennessee and Missouri. The question presented to this Court was whether the Eleventh Amendment prevented the action from being prosecuted against the corporation in federal court.

There were three opinions in this Court. Justice Douglas, writing for the majority, "assume[d] *arguendo* that this suit must be considered as one against the States. . . ." 359 U.S. at 279. He phrased the question decided as "whether Tennessee and Missouri have waived their immunity under the facts of this case," 359 U.S. at 277, and held that they had waived it. That is the only subject the majority opinion treated. Three justices concurred on the express "understanding that we do not reach the constitutional question as to whether the Eleventh Amendment immunizes from suit agencies created by two or more States under state compacts which the Constitution requires to be approved by the Congress." 359 U.S. at 283. Three justices dissented from the majority's finding of waiver, construing the majority opinion as "acknowledging the applicability of the provisions of the Eleventh Amendment to the Tennessee-Missouri Bridge Commission. . . ." 359 U.S. at 283.

The Court of Appeals recognized that the three concurring justices had expressly reserved the applicability of the Eleventh Amendment to interstate agencies. It believed, however, that the three dissenting justices had decided that it applied to all interstate agencies, apparently reasoning by extension from their conclusion that it applied to the Bridge Commission. It also believed that the three majority justices had reached the same conclusion, apparently *sub silentio*. The Court of Appeals therefore considered itself "bound by *Petty*" to find TRPA and all other compact agencies immune from suit under the Eleventh Amendment.

There are three serious defects in the Court of Appeals' reasoning. First, the majority opinion in *Petty* only "assume[d] *arguendo*" the applicability of the Eleventh Amendment. The concurring opinion makes clear that this assumption for the sake of argument was not to be taken as deciding that constitutional question. Second, even the majority opinion's *arguendo* assumption is not phrased in terms of a categorical rule for all interstate agencies. On the contrary, the majority's assumption was based only on the conclusion that "*this* bi-state agency is a joint or common agency of Tennessee and Missouri." (Emphasis added.) 359 U.S. at 279. That conclusion, in reference to the Bridge Commission, was amply supported by analysis of the Bridge Commission's status in the decision of the Eighth Circuit, *Petty v. Tennessee-Missouri Bridge Commission*, 254 F.2d 857, 859-60 (8th Cir. 1958). It does not suggest a class-wide rule but, on the contrary, is entirely consistent with a case-by-case analysis, based on established principles, of the characteristics of each agency that comes before the Court. Third, the only portions of this Court's fourteen-page decision that deal with the applicability of the Eleventh Amendment to compact entities are the three short passages that have been cited. All else pertains to waiver. These three lonely sentences, devoid of explanation or reference to authority, are not the sort of underpinning one would expect to find in an opinion of this Court for a broad rule of constitutional law that had never before been addressed.

The Court of Appeals' *per se* rule suffers from a more fundamental defect than absence of authority, however. In singling out compact agencies for special protection for no discernible reason, it is also in conflict with the general approach employed by this Court in deciding on a case-by-case basis whether other governmental bodies are arms or *alter egos* of a state entitled to the state's Eleventh Amendment immunity.

Not every element of state government is entitled to Eleventh Amendment immunity. Counties, municipal corporations, and other political subdivisions of a state are subject to suit in the federal courts. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977); see also *Edelman v. Jordan*, 415 U.S. 651, 667, n. 12 (1974); *Moor v. County of Alameda*, 411 U.S. 693, 717-21 (1973); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). These decisions demonstrate that in order to determine whether the Eleventh Amendment applies to a governmental unit other than a state itself, one must look to the characteristics of the particular agency and the closeness of its relationship to the state.

In *Mt. Healthy* this Court was asked to decide whether the Eleventh Amendment applied to a local school board. In considering this question, it explained

> "The issue here . . . turns on whether the [agency] is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend. The answer depends, at least in part, upon the nature of the entity created by state law." 429 U.S. at 280.

It therefore looked to Ohio statutes providing that school districts are "political subdivisions" and to the board's power to issue bonds and levy taxes as a source of financing independent of the state treasury. Although the board was "subject to some guidance from the State Board of Education" and received "a significant amount of money from

the State," the Court concluded that the school board was "more like a county or city than it is like an arm of the state," and accordingly refused it Eleventh Amendment immunity. 429 U.S. at 280.

Similar analysis was employed in *Moor v. County of Alameda,* 411 U.S. 693, 717-21 (1973). There it was decided that a federal district court had diversity jurisdiction over a suit against a California county. The Court took note of various provisions of California law governing a county's powers, including statutes describing its relationship to the State for purposes of suit, as well as applicable court decisions. On the basis of its analysis the Court rejected the county's contention that it was simply an arm or *alter ego* of the State not subject to diversity jurisdiction.[9]

The same case-by-case approach is applicable to agencies created by interstate compacts. Unlike the Court of Appeals' categorical rule, it acknowledges that all interstate compact entities are not alike. Some, like the Tennessee-Missouri Bridge Commission, are intimately tied to the government of the States and are appropriately treated as their arms. Others, like a unified school district authorized by compact for Hanover, New Hampshire, and Norwich, Vermont,[10] are for all practical purposes indistinguishable from intrastate local governmental units to which the Eleventh Amendment does not apply. There is no reason to treat compact entities differently from the intrastate agencies they most closely resemble solely because they are created by compact.

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9. *Moor* did not expressly address the applicability of the Eleventh Amendment. That it did not apply is implicit in the Court's holding that the federal court had diversity jurisdiction. *Moor* has been so read in later decisions. *Mt. Healthy, supra,* 429 U.S. at 280; *Edelman, supra,* 415 U.S. at 667, n.12.

10. New Hampshire-Vermont School District Compact, Act of November 13, 1963, Pub. L. No. 88-177, 77 Stat. 332.

The decision of the Eighth Circuit in *Petty, supra,* and the recent decision of the Second Circuit in *Trotman v. Palisades Interstate Park Commission,* 557 F.2d 35 (2d Cir. 1977), also show that for Eleventh Amendment purposes the origin of the agency in an interstate compact is not important.[11]

In deciding that the Tennessee-Missouri Bridge Commission was immune from suit under the Eleventh Amendment, the Eighth Circuit in *Petty* weighed, among other factors, the state character of the functions the Commission was found to perform; its control by the governors of the compacting states; the fact that the bridge it built was to belong to the states when paid for; the Commission's sources of financing; and the effect of a judgment against it on the governmental operations of the states. Because it found on the basis of this analysis that the Commission was "an instrumentality of both Tennessee and Missouri and . . . not an entity separate and distinct from the States," it held the Eleventh Amendment applicable. 254 F.2d at 860.

The Second Circuit in *Trotman* took a similar analytic approach in deciding whether the Eleventh Amendment applied to the Palisades Interstate Park Commission, a bi-state agency created by compact between New York and New Jersey. It found that "there are many factors which must be considered in determining whether a state instrumentality can raise the bar of the Eleventh Amendment," 557 F.2d at 38, citing its earlier decision in *Fitzpatrick v. Bitzer,* 519 F.2d 559 (2d Cir. 1975), *reversed in part on other grounds,* 427 U.S. 445 (1976), where it had ruled on the Eleventh Amendment's applicability to the Connecticut

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11. Indeed, to the extent the interstate origin of the agency is relevant, it would dictate that the agency should *not* have Eleventh Amendment immunity. See pp. 25-26 below.

State Retirement Fund. Relying primarily on the fact that a judgment against the Commission would be paid from the state treasury, the *Trotman* court found the Commission immune under the Eleventh Amendment because

> ". . . an analysis of all the pertinent factors as set out in the compact and applicable New York laws leads us to the inevitable conclusion that in reality this suit against the Commission is one against the State of New York." 557 F.2d at 38.[12]

In short, the Court of Appeals erred in holding that TRPA's creation by compact made unnecessary an examination of its particular characteristics in order to determine its Eleventh Amendment status.

B. The Tahoe Regional Planning Agency Is Not an Arm of the States Entitled to Eleventh Amendment Immunity.

The application of the Eleventh Amendment to TRPA turns on whether TRPA is an arm or alter ego of California and Nevada or is instead a "municipal corporation or other political subdivision" to which the Eleventh Amendment does not extend. *Mt. Healthy, supra,* 429 U.S. at 280.

12. Other lower court decisions also support this approach. In *Byram River v. Village of Port Chester, New York,* 394 F. Supp. 618 (S.D.N.Y. 1975), Judge Knapp used a similar analysis in reaching the conclusion that the Eleventh Amendment provided no immunity for a tri-state agency created by compact. The Second Circuit cited *Byram River* with approval in *Trotman.* In fact, no reported decision, other than the Ninth Circuit's in this case, has found the origin of the agency in a compact to confer Eleventh Amendment immunity. See also *United States Steel Corporation v. Multistate Tax Commission,* 367 F. Supp. 107, 113 (S.D.N.Y. 1973) (dictum):

> "Even if there were no question of the constitutional validity of the Commission, the mere fact that an agency is a valid state agency would not automatically entitle it to eleventh amendment immunity as a matter of law. In each case, the facts must be closely scrutinized to determine whether the agency in question is, in effect, an arm or alter ego of the state so as to entitle it to immunity." 367 F. Supp. at 113 (citations omitted).

A three-judge district court later granted summary judgment on other grounds 417 F. Supp. 795 (S.D.N.Y. 1976), *affirmed,*— U.S.—, 98 S.Ct. 799 (February 21, 1978).

The Compact establishes that TRPA is not an arm or alter ego of California and Nevada. It is expressly made a "separate legal entity." [Compact, Art. III(a), A.P. 65] Furthermore, TRPA is deemed a "political subdivision" of the compacting states[13] for the purpose of suits in the federal courts:

> "Each [civil] action [to which TRPA is a party] shall be brought in a court of the state . . . where the property affected . . . is situated, *unless the action is brought in a federal court. For this purpose, the agency shall be deemed a political subdivision* of both the State of California and the State of Nevada." (Emphasis supplied) [Compact, Art. VI(b), A.P. 75]

Thus, the Compact itself answers the question whether TRPA is to be treated as a "political subdivision" which is not immune from suit. It expressly provides that TRPA is to be so treated.

The Compact's other provisions confirm that TRPA is not an arm of the states. Although its "regional" jurisdiction includes portions of two states and five counties, it is highly localized; the "region" it regulates is but a tiny corner of the states, smaller than all but one of the counties it overlaps.[14] See Map, Appendix A. The land use regulation

13. *Cf. Mt. Healthy,* 429 U.S. at 380: "Under Ohio Law the 'state' does not include 'political subdivisions' and 'political subdivisions' do include local school districts."

14. TRPA strenuously argued in opposition to the petition for certiorari that it is "far more than a local government." Brief of Certain Respondents in Opposition to Petition, p. 19. It claims instead to be a "regional" sort of government. Even if there is a distinction between "local" and "regional" government for other purposes, however, it is a distinction without a difference for purposes of the Eleventh Amendment. Whatever it is, TRPA is less than, and certainly distinct from, the government of any state.

at issue here is traditionally performed by local government. Its authority to make rules is not subject to veto at the state level. [See Compact, Art. VI, A.P. 73] A majority of the members of the governing body (six of ten voting members) are appointed by *counties and cities* rather than the states [Compact, Art. III(a), A.P. 65-66]; ten of the 17 members of the Advisory Planning Commission specified in the Compact are also associated with local agencies, and four others are to be residents of the region, while only one is from state government. [Compact, Art. III(h), A.P. 67-68]

The Compact also provides that TRPA's funding is to come from the counties rather than the states.[15] [Compact, Art. VII(a), A.P. 77] Indeed, the Compact expressly insulates the states from liability, providing that "[n]o obligation contracted by the agency shall bind either of the party states or any political subdivision thereof." [Compact, Art. VII(f), A.P. 78] It likewise provides that expenses incurred by the governing body in the exercise of its powers, other than the expenses of its individual members, are to be met by TRPA out of its own funds. [Compact, Art. III(b), A.P. 66] All these provisions indicate a considered decision to separate TRPA from organs of government at the state level.[16]

15. TRPA may also collect fees for services rendered and is authorized to accept gifts, donations, subventions, grants, and other financial aid and funds. [Compact, Art. VII(b) and (d). In its brief in opposition to the petition for certiorari, TRPA asserted that most of its funding comes from the state and federal government. Brief of Certain Respondents in Opposition to Petition, p. 16. There is no support in the record for this contention, and the only funding TRPA can count on under the Compact is that assessed on the counties. Minor appropriations by the state as a matter of grace cannot transform TRPA, any more than a city or county, into a state agency. Moreover, whatever the sources of the monies in TRPA's bank account, a judgment against it must be satisfied from that account and not from the treasury of either state. See immediately following text. *Compare Trotman, supra,* 557 F.2d at 38, where the decisive factor was apparently that the Commission's only revenues provided for by the compact, aside from gifts, were appropriations by the states' legislatures and use fees, which were required to be paid over to the state treasury, from which any judgment against the Commission would be paid.

Both the compacting states, moreover, have vigorously contended in this and related litigation that TRPA is not an arm of either state. As the State of California put it, TRPA is "no more a California state agency than are the City of Los Angeles or the County of Placer . . . [I]t is separate and distinct from the state, rather than being one of its arms. . . ." [A.P. 82; Brief of Appellee State of California, August 2, 1976, filed in No. 76-1608, *Layton-Tahoe Properties v. Tahoe Regional Planning Agency et al.,* pp. 7-9] Nevada has taken the same position. [See A.P. 82-83; Brief of Appellee State of Nevada, July 2, 1976, filed in No. 76-1608, *Layton-Tahoe Properties v. Tahoe Regional Planning Agency et al.,* p. 7]

These factors all distinguish TRPA from the Tennessee-Missouri Bridge Commission, which the Eighth Circuit decided in *Petty* was entitled to Eleventh Amendment immunity. The Eighth Circuit there concluded that the Bridge Commission was an arm or instrumentality of the state governments. It performed a state governmental function, providing bridges and highways. 254 F.2d at 859. In contrast, TRPA performs traditionally local governmental functions. In *Petty,* the bi-state agency was governed by a body consisting entirely of appointees of the compacting states' governors, and its actions were subject to veto by the

16. In addition, if the Court of Appeals were correct, which it is not, in ruling that TRPA acts under authority only of federal law under the Compact and not under authority of state law as well, that would be an additional factor showing that TRPA is not identifiable with the States whose Eleventh Amendment immunity it is now claiming. See pp. 30-31, below.

governors. 254 F.2d at 859. TRPA, on the other hand, is governed by a body not made subject to veto power by the states, and a majority of its members are appointed by *local* governments. Aside from bridge tolls, which were pledged for operating expenses and bond retirement, the Bridge Commission's only sources of operating revenues provided for by the compact were the states and the federal government. 254 F.2d at 860. The Compact here, however, provides for TRPA's financing by the counties, insulates the states from its obligations, and requires it to pay for its expenses out of its own funds.[17] Execution on a judgment against the Commission, according to the Eighth Circuit, would have been on the bridge it operated, which was to belong to the states when bonded indebtedness was paid. 254 F.2d at 860. No such factor is present here. The Bridge Commission was found by the court not to be "an entity separate and distinct from the States." 254 F.2d at 860. TRPA is expressly made a "separate legal entity," and none of its obligations bind the states.

In short, examination of TRPA's powers and functions shows that it is not an arm or alter ego of the States of California and Nevada and is not entitled to their Eleventh Amendment immunity from suit in a federal court.

C. Under the Compact the States Have Waived any Eleventh Amendment Immunity the Tahoe Regional Planning Agency Might Otherwise Have.

As Justice Douglas stated in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 276 (1959), states may waive Eleventh Amendment immunity, *Missouri v. Fiske*, 290 U.S. 18, 24 (1933), as by a general appearance in litigation in a federal court, *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883), or by statute. *Ford Motor v. Department of Treasury*, 323 U.S. 459, 468-70 (1945). They may also waive it under an interstate compact. *Petty, supra*, 359 U.S. at 280-82.

17. Even if TRPA received "a significant amount of money from the State," that would not be determinative. See *Mt. Healthy, supra*, 429 U.S. at 280.

In *Petty*, the states waived immunity by including in the compact a clause authorizing the Bridge Commission "to sue and be sued in its own name." Although apparently neither state construed such a sue-and-be-sued clause as authorizing suit against a public corporation, this Court, interpreting the clause as federal law, held that it did. In addition, it took note of a condition imposed by Congress on its consent providing that nothing in the compact should "be construed to affect, impair, or diminish any right, power, or jurisdiction of the United States or of any court, department, board, bureau, officer, or official of the United States over or in regard to any navigable waters or any commerce between the States. . . ." 359 U.S. at 277. The Court read this clause as preserving the jurisdiction of the federal courts in matters over which they would otherwise have jurisdiction "by virtue of the fact that the Mississippi is a navigable stream and that interstate commerce is involved. . . ." 359 U.S. at 281.

The Tahoe Regional Planning Compact contains similar provisions. Nevertheless, the Court of Appeals found no waiver of immunity for TRPA. It gave as its reason the asserted absence of a sue-and-be-sued clause and of a provision attached by Congress waiving TRPA's immunity. [A.P. 11-12; 566 F.2d at 1361-62] Its conclusion is wrong on both counts.

Although the Compact does not use the words "sue and be sued," Article VI(b) of the Compact, quoted above at p. 19, is an equivalent. It expressly contemplates "civil

actions to which the agency is a party," and significantly for waiver purposes it expressly mentions actions "brought in a federal court." Moreover, it is in this section and "[f]or this purpose" that TRPA is "deemed a political subdivision" of the compacting states, a type of governmental agency that does not have Eleventh Amendment immunity. See *Mt. Healthy, supra,* 429 U.S. at 280. This express reference to actions involving the agency as a party in the federal courts is a far clearer indication of waiver than the sue-and-be-sued clause in which waiver was found in *Petty.*

In addition, Congress in consenting to this Compact included a reservation of powers similar to the one construed as requiring a waiver in *Petty.* It provides that nothing in the Compact should "in any way affect the powers, rights, or obligations of the United States, or the applicability of any law or regulation of the United States in, over, or to the region. . . ." [A.P. 79-80] Although not identical to the *Petty* provision, it "in essence convey[s] the same meaning." 359 U.S. at 287 (Frankfurter, J., dissenting). To the extent it differs, it is even broader than the *Petty* provision, not being limited to preserving the applicability of federal laws on any particular subject. The "powers of the United States" it preserves presumably include the judicial power and the "applicability of any law" presumably includes both constitutional provisions and jurisdictional statutes for the federal courts.

The provisions of Article VI(b) bearing on waiver must also be construed in light of other provisions of the Compact, discussed above, dealing with the constitution, funding, and other aspects of TRPA, which indicate that the compacting states and Congress never intended that the Eleventh Amendment would apply to TRPA. At the

very least, they must be interpreted as indicating an intention to waive any immunity that does attach to TRPA. Any other result renders meaningless the Compact's reference to suits in the federal courts. See *Edelman v. Jordan,* supra, 415 U.S. at 673: ". . . we will find waiver only where stated 'by the most express language *or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction*' " (emphasis supplied).[18]

Finally, the fact that these waiver provisions appear in an interstate compact should lead the Court to resolve any remaining doubts, if there were any, in favor of waiver. While waiver of Eleventh Amendment immunity will generally not be lightly inferred, this Court in *Petty* also made clear that in interpreting an interstate compact it "must treat the compact as a living interstate agreement which performs high functions in our federalism. . . ." 359 U.S. at 279. Interests of federalism and comity are served by permitting suits against interstate agencies to be resolved in federal courts. Otherwise, decision of such disputes requires one state's court to call before it and adjudicate the liability of an agency that by hypothesis is an arm of at least one other state and perhaps of several other states. In addition to potential jurisdictional problems,[19] there is fertile ground for dissension and conflict among the compacting states, particularly where, as here, the relationship is already tense. See generally, Note, Regional Government for Lake Tahoe, 22 Hastings L.J. 705, 708-15 (1971); *Cali-*

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18. The States' position that TRPA is not an arm of either state and TRPA's own failure to assert the Eleventh Amendment in any of the courts below, indicating that the agency itself never believed it had such immunity, also favor this construction of Article VI(b). See p. 21, above.

19. See *Western Union Co. v. Pennsylvania,* 368 U.S. 71, 80 (1961); *Nathan v. Virginia,* 1 Dall. 77, 1 L.Ed. 44 (Ct. of Common Pleas, Philadelphia, 1781).

fornia ex rel. Younger v. Tahoe Regional Planning Agency, 516 F.2d 215 (9th Cir.), *cert. denied,* 423 U.S. 868 (1975). A relatively neutral federal forum would minimize such potential conflicts between the courts of the states. See *League to Save Lake Tahoe v. B.J.K. Corporation,* 547 F.2d 1072, 1074-75 (9th Cir. 1976). These considerations could well justify a rule that the Eleventh Amendment should never apply to suits against an interstate agency. At the very least, however, the Court should not lightly assume that Congress (or the compacting states) intended that suit against an interstate agency should have to be brought in state courts. Nothing in this Compact indicates that result; in fact, all indications, including the express terms of the Compact, are to the contrary.

D. The Eleventh Amendment Is No Bar to This Suit for the Additional Reason That Petitioners Assert Claims Under 42 U.S.C. § 1983 for Deprivation of Their Civil Rights.

Another, independently sufficient basis for denying Eleventh Amendment immunity in this case has arisen since the petition for certiorari was filed, in light of *Monell v. Department of Social Services of the City of New York,* — U.S. —, 98 S.Ct. 2018 (June 6, 1978).

Lake Country's claims include claims of deprivation of constitutional rights under color of state law based upon Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983.[20] Section 1983 provides a remedy against "any *person* who, under color of any statute, ordinance, regulation, custom,

20. In addition, Lake Country stated claims directly under the Fifth and Fourteenth Amendments under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), over which the Court of Appeals held it had federal question jurisdiction pursuant to 28 U.S.C. § 1331. [A.P. 15-16; 566 F.2d at 1363-64] It held, however, that Lake Country could not maintain its § 1983 claims against the defendants on the grounds that they do not act under color of state law. See pp. 30-31, below.

or usage, of any State" deprives another person of rights secured by the Constitution. This Court held in *Monell* that Congress intended "municipalities and other local government units" to be included among those persons to whom Section 1983 applies. 98 S.Ct. at 2035.

The holding in *Monell* was limited "to local governmental units which are not considered part of the State for Eleventh Amendment purposes." 98 S.Ct. at 2036, n. 54. However, both the Court's reasoning and the legislative history of Section 1983 reviewed in *Monell* compel the conclusion that the section should apply equally to suits against any person, regardless of whether or not it would be considered part of the state for Eleventh Amendment purposes. *See Hutto v. Finney,* — U.S. —, 98 S.Ct. 2565, 2580 (June 23, 1978) (Brennan, J., concurring). The Court pointed out in *Monell,* for example, that Congressional supporters of the Section were "quite clear that § 1 of the act [§ 1983] extended a remedy not only *where a State had passed an unconstitutional statute,* but also where *officers of the State* were deliberately indifferent to the rights of black citizens." 98 S.Ct. at 2033, n. 45 (emphasis added)[21] The Court in *Monell*

21. Among the supporters the Court quoted were Representatives Bingham, Shellabarger, and Edmunds. Representative Bingham stated that the act's purpose was the enforcement of the Fourteenth Amendment on behalf of every citizen "to the extent of the rights guaranteed to him by the Constitution. . . . Who dare say, now the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of rights as these in the States *and by the States,* or combinations of persons." 98 S. Ct. at 2033, n. 45. (emphasis added) Representative Shellabarger explained the function of § 1 of the act [§ 1983] in the following terms: [It] . . . provides a civil remedy . . . to all people where, *under color of State law,* they . . . may be deprived of rights to which they are entitled under the Constitution. . . ." 98 S.Ct. at 2032 (emphasis added). To this effect, Senator Edmunds stated that "[It defines] the rights secured by the Constitution . . . when they are assailed by *any State law* or under color of any State law. . . ." 98 S.Ct. at 2033 (emphasis added).

also relied heavily on its conclusion that Section 2 of the Dictionary Act, Act of February 25, 1871, ch. 71, § 2, 16 Stat. 431, passed only months before the Civil Rights Act, provided a definition of the word "person" used to describe the class of defendants in Section 1983 suits. It reads in pertinent part:

> "in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in more limited sense."

TRPA is a body politic and corporate and therefore a person under Section 1983. It is a separate legal entity and a political subdivision of the states under the Compact. It would be no less a body politic and corporate if it were otherwise an arm of the states for Eleventh Amendment purposes. The phrase "bodies politic and corporate" includes even the states themselves. See, e.g., *United States v. Maurice*, 2 Brock 96, 109 (C.C. Va. 1823) (Marshall C.J.) ("The United States is a government and, consequently, a body politic and corporate."). See also *Pfizer, Inc. v. Government of India*, — U.S. —, 98 S.Ct. 584, 589, n. 15 (1978) (A foreign nation is a "person" within the meaning of § 4 of the Clayton Act).

It is now established, moreover, that the Eleventh Amendment is no bar to a suit authorized by Congress in the exercise of its enforcement powers under Section 5 of the Fourteenth Amendment. In *Fitzpatrick v. Bitzer*, 427 U.S. 457 (1976), this Court upheld Congress' authority, in the exercise of those enforcement powers, to require states to submit to private suits from which they would otherwise be immune under the Eleventh Amendment. The Court in that case held that an action could be maintained against the Connecticut State Retirement Fund under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42

U.S.C.A. § 2000e *et seq.* (1970 ed. and Supp. IV). The Court recently affirmed the principle of *Fitzpatrick v. Bitzer* in *Hutto v. Finney, supra*, upholding an award of attorneys' fees to be paid out of the funds of the Alabama Department of Corrections. The decision was based in part on Congressional authorization of such awards against the states in the Civil Rights Attorney's Fees Award Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976), codified in 42 U.S.C. § 1988, enacted under Section 5 of the Fourteenth Amendment.

Section 1983 was also enacted pursuant to Congress' enforcement powers under Section 5 of the Fourteenth Amendment.[22] Furthermore, the legislative history of Section 1983 shows that Congress intended Section 1983 to be interpreted as broadly as possible. Representative Perry stated that Congress in enacting Section 1983 had "asserted as fully as we can assert the constitutional rights of Congress to legislate." See *Monell, supra*, 98 S.Ct. at 2033, n. 45, and p. 27, above. Accordingly, it is neither necessary nor reasonable to construe the Eleventh Amendment as a limitation on the definition of "person" under Section 1983 or the scope of suits permitted under it.[23]

It has been shown above that TRPA does not have Eleventh Amendment immunity. It follows from *Monell, Fitzpatrick* and *Hutto*, however, that even if the Eleventh

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22. The very title of the Act, "An Act to enforce the provisions of the Fourteenth Amendment and for other purposes," lays to rest any doubt about the power being exercised by Congress in enacting it.

23. The per curiam decision in *Alabama v. Pugh*, — U.S. —, 98 S.Ct. 3057 (July 3, 1978), upheld the Eleventh Amendment as a defense in a prisoner suit which was brought under Section 1983. However, as Justice Stevens observed in his dissenting opinion, the Court surely did not intend to resolve this issue summarily in this decision. See 98 S.Ct. at 3059 n.

Amendment otherwise did apply to TRPA, it would provide no defense to petitioners' Section 1983 claims.

The Court of Appeals here ruled that although petitioners stated a claim for deprivation of their rights under the Fifth and Fourteenth Amendments, they nevertheless had no claim under Section 1983 because the deprivation was not "under color of state law." It reasoned that "[w]hile TRPA exercises the power of the constituent states, it does so pursuant to federal law" since the compact is a federal law for jurisdictional purposes. [A.P. 15, n. 20; 566 F.2d at 1363 and n. 20] It maintained that this was "not inconsistent with [its] earlier finding of state *action* to support a cause of action under the Fourteenth Amendment." *Id.*

In fact, these rulings are entirely inconsistent. It makes no sense to say that TRPA's action is "state action" under the Fourteenth Amendment but not "under color of any law, statute, ordinance, regulation, custom, or usage of any State" under Section 1983. The two "have consistently been treated as the same thing." *United States v. Price,* 383 U.S. 787, 794, n.7 (1966). The very purpose of Section 1983 is to enforce the Fourteenth Amendment. Furthermore, although the Compact is federal law for purposes of federal court jurisdiction, it does not follow that it is not also state law. TRPA's authority results not only from Congress' consent to the Compact, but also from enactment of the Compact by both California and Nevada. The Compact is on the statute books of both states, and either state can repeal TRPA's authority within its jurisdiction, in spite of Congress' consent, by withdrawing from it. [Compact, Art. VIII(c), A.P. 79] To say that TRPA does not act under color of the states' authority, as well as that of Congress, is entirely unrealistic, as the Court of Appeals

itself recognized in finding that TRPA was subject to the Fourteenth Amendment.[24]

* * *

In summary, TRPA is not entitled to Eleventh Amendment immunity in the first place, based on an analysis of its powers and functions and its relationship with the compacting states. In addition, under the Compact, California and Nevada waived any immunity TRPA might have had. Finally, even if TRPA's immunity had not been waived generally, it still would provide no defense to petitioners' claims under Section 1983, which was enacted under Congress' authority to enforce the Fourteenth Amendment.

II. THE MEMBERS OF THE TAHOE REGIONAL PLANNING AGENCY'S GOVERNING BODY ARE ENTITLED TO ONLY A QUALIFIED IMMUNITY FROM ACTIONS FOR DAMAGES BASED ON THEIR UNCONSTITUTIONAL ACTS.

The Court of Appeals ruled below that the members of TRPA's governing body are absolutely immune from suits to the extent their challenged acts were performed in a "legislative" capacity.[25] It characterized TRPA as a "re-

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24. In thus finding that congressional consent has precluded application of § 1983 to TRPA, the Court of Appeals again wholly disregarded Section 5 of the Act granting consent which provides that "[n]othing contained in this Act . . . shall in any way affect . . . the applicability of any law or regulation of the United States. . . ." Section 1983 is such a law. In addition, there have been other cases in this Court in which regulations of a state that required federal approval have nevertheless apparently been the basis of a § 1983 action. *Rosado v. Wyman,* 397 U.S. 397 (1970); *King v. Smith,* 392 U.S. 309 (1968); see Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84 (1967). That should be true here as well. But if the Court of Appeals is correct and TRPA does not act under color of state law at all, that certainly is an additional factor tending to show that TRPA is not an arm or alter ego of the states entitled to their Eleventh Amendment immunity. See pp. 18-22, above.

25. The Court of Appeals agreed th[illegible] TRPA's members are entitled to only a qualified immunity to the extent they were acting in an "executive" capacity. [A.P. 19, 566 F.2d at 1365]

gional legislature," and referring to this Court's decisions granting members of Congress and state legislatures absolute immunity, *Doe v. McMillan,* 412 U.S. 306 (1973); *Tenney v. Brandhove,* 341 U.S. 367 (1951), it "discern[ed] no reason why those 'regional legislators' should not be accorded the same immunity as their state and national counterparts." [A.P. 18-19, 566 F.2d at 1365]

The Court of Appeals' extension of absolute immunity to the members of such an administrative body as TRPA is unprecedented in the decisions of this Court. While this Court has found absolute immunity appropriate for state and federal legislators, *Doe v. McMillan, supra; Tenney v. Brandhove, supra;* and for judicial officers and federal officials acting in judicial roles, *Butz v. Economou,* — U.S. —, 98 S.Ct. 2894, 2912-16 (June 29, 1978); *Stump v. Sparkman,* — U.S. —, 98 S.Ct. 1099 (March 28, 1978); *Imbler v. Pachtman,* 424 U.S. 409 (1976); *Pierson v. Ray,* 386 U.S. 547 (1967); it has refused it to a state's highest executive officer, *Scheuer v. Rhodes,* 416 U.S. 232 (1974). It has never extended absolute immunity to officials of subordinate state agencies or political subdivisions such as TRPA, limiting such officials to a qualified immunity. *Procunier v. Navarette,* — U.S. —, 98 S.Ct. 855 (February 22, 1978); *O'Connor v. Donaldson,* 422 U.S. 563 (1975).[26]

This Court's recent decision in *Butz v. Economou* again made it clear that absolute immunity is an exception with very limited application. As the Court put it, "federal officials who seek absolute exemption from personal liability

26. Although most of these decisions dealt with the form of official immunity available in actions under 42 U.S.C. § 1983, while this is in part a *Bivens* action, the Court of Appeals correctly ruled that the immunities in both sorts of actions are identical. [A.P. 16-17, 566 F.2d at 1364.] This Court agreed with that proposition in *Butz v. Economou, supra,* 98 S.Ct. at 2907-10.

for unconstitutional acts must bear the burden of showing that public policy requires an exemption of that scope." This complete protection is confined "to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." 98 S.Ct. at 2911.

Notably, in *Wood v. Strickland,* 420 U.S. 308 (1975), this Court denied absolute immunity to the members of an elected local school board. Although acknowledging that "school board members function at different times in the nature of legislators and adjudicators" (420 U.S. at 319), it permitted them only a qualified immunity in administering discipline to a student, where presumably they acted in their judicial role. TRPA's members functioning "legislatively" have no greater claim to absolute immunity than school board members functioning "judicially." Both should be entitled only to the same qualified immunity which this Court carefully defined in *Wood.*

The Ninth Circuit's extension of absolute immunity to TRPA's members is also in conflict with decisions of the First, Fifth, Sixth, Seventh, and Eighth Circuits, which have denied absolute immunity to subordinate "legislative" bodies. *Williams v. Anderson,* 562 F.2d 1081, 1101 (8th Cir. 1977) (school board members); *Jones v. Diamond,* 519 F.2d 1090, 1101 (5th Cir. 1975) (county supervisors); *Curry v. Gillette,* 461 F.2d 1003, 1005 (6th Cir.), *cert. denied,* 409 U.S. 1042 (1972) (aldermen); *Progress Development Co. v. Mitchell,* 286 F.2d 222, 231 (7th Cir. 1961) (members of park district board and village board of trustees); *Nelson v. Knox,* 256 F.2d 312, 314-15 (6th Cir. 1958) (city commissioners); *Cobb v. City of Malden,* 202 F.2d 701, 706-07 (1st Cir. 1953) (McGruder, C.J., concurring) (city councilmen).

Justice Stewart, then on the Sixth Circuit, stated the rule twenty years ago in *Nelson v. Knox, supra,* when he said:

> "In the light of the relevant federal decisions, we cannot agree that members of a municipal legislative body share the complete immunity from liability which is enjoyed by judges and state legislators. . . .
>
> "It is our opinion that the defendants in this case were not clothed with complete immunity but enjoyed instead a qualified privilege." 256 F.2d at 314-15.

Nearly one hundred years ago this Court recognized that the absolute legislative immunity given Congress is not, as the Court of Appeals assumed, an attribute of every "legislative" body but an exceptional privilege given to Congress by the Constitution because of its special position as an independent department of the national government. In *Kilbourn v. Thompson,* 103 U.S. 168 (1881), a witness who had refused to answer questions put to him by the House of Representatives was imprisoned for contempt by order of the House. He brought an action for false imprisonment against the sergeant-at-arms of the House and several members. After finding that the House did not have the power to jail the witness, the Court considered the defense of immunity raised by the representatives who had introduced and voted on the resolution directing his arrest. The Court stated:

> "If they had done this in any ordinary tribunal, without probable cause, they would have been liable for the action which they had thus promoted.
>
> "The House of Representatives is not an ordinary tribunal. The defendants set up the protection of the Constitution, under which they do business as part of the Congress of the United States. That Constitution declares that . . . 'for any Speech or Debate in either House, they shall not be questioned in any other place.'" 103 U.S. at 201.

Reading the speech and debate clause as broadly protecting all forms of Congress' "legislative" activity, the Court held the representatives absolutely immune from Kilbourn's action. It saw the speech and debate clause as only one of a number of parliamentary privileges conferred on Congress by the Constitution that, taken as a whole, were designed to preserve Congress' special status as a coordinate branch of the federal government. 103 U.S. at 201-202, 190, 192.

Later decisions of this Court have confirmed that the roots of absolute legislative immunity are found in the Constitutional mandate of the speech and debate clause and comparable provisions contained in the constitutions of virtually every state. *Tenney v. Brandhove, supra,* 341 U.S. at 372-375; see *Imbler v. Pachtman, supra,* 424 U.S. at 434-35, n. 1 (White, J., concurring). They have also reiterated that its function is to preserve the independence of these bodies from the other departments and to insure the separation of powers ordained by the Constitution by preventing domination of the co-equal legislative branch by the executive and judiciary branches through intimidation of individual legislators. *Doe v. McMillan, supra,* 412 U.S. at 311 (1973); *Gravel v. United States,* 408 U.S. 606, 616, 617 (1972); *United States v. Brewster,* 408 U.S. 501, 508 (1972); *United States v. Johnson,* 383 U.S. 169, 178-179 (1966). It is thus not the policymaking function of Congress and state legislatures that gives their members absolute immunity, but their positions of special dignity as the highest such bodies in the constitutional scheme.

Moreover, as the Court observed in *Kilbourn,* this absolute immunity does not stand alone. It is part of a package of other parliamentary privileges that also serve to buttress the separation of powers. Other parts of this package and

other attributes of Congress and state legislatures counterbalance the danger that the absolute privilege will be abused by operating to deter arbitrary and malicious action by legislative officials and to remedy it when it occurs. The power to punish or expel members for misconduct is one of these other attributes.[27] From the earliest days, it has been relied on by the courts as an alternative to judicial scrutiny of legislator's actions and a justification for absolute legislative immunity. *Coffin v. Coffin*, 4 Mass. 1, 28 (1808). In addition, and most importantly, the conduct of the members of these bodies is regularly subject to scrutiny by the people in periodic elections. These checks, not judicial review, are the ones the Constitution's framers relied on to prevent abusive action. Accordingly, the Court in *Tenney v. Brandhove* rejected judicial intervention in the affairs of state legislatures and held that "[s]elf-discipline and the voters must be the ultimate reliance for discouraging or correcting . . . abuses." 341 U.S. at 328.

The considerations that justify absolute immunity for members of Congress and state legislatures do not support it for the members of TRPA's governing body. TRPA and other subordinate bodies do not come within the speech and debate clause. TRPA, in fact, lacks virtually every element of parliamentary privilege with which the protection

27. U.S. Const. art. I, § 5, cl. 2; Cal. Const. art. IV, § 5; Nev. Const. art. 4, § 6. Examples of other elements of parliamentary privilege include the power to judge the election and qualifications of members, U.S. Const. art. I, § 5, cl. 1; Cal. Const. art. IV, § 5; Nev. Const. art. 4, § 6; the power to compel attendance of absent members, U.S. Const. art. I, § 5, cl. 1; Cal. Const. Art. IV, § 7(a); Nev. Const. art. 4, § 13; and privilege from arrest during sessions, U.S. Const. art. I, § 6, cl. 1; Cal. Const. art. IV, § 14; Nev. Const. art. 4, § 11. TRPA lacks these attributes. Its members are also not subject to the usual restrictions forbidding legislators from holding other offices, *e.g.*, U.S. Const. art. I, § 6, cl. 2; Cal. Const. art IV, § 13; Nev. Const. art. 4, § 8.

of the speech and debate clause is associated and that generally characterize Congress and state legislatures. Nothing in the Constitution requires the separation of powers principle to be observed in a subordinate level of government like TRPA.

In fact, TRPA's governing body's only resemblance to Congress or a state legislature is that it makes rules, and even that resemblance is superficial. Unlike a legislature, TRPA also has "executive" enforcement powers [Compact Art VI(b), A.P. 75] and even its rulemaking authority is restricted to resource conservation and developmental planning and is further circumscribed by the basic policies laid down by the Compact. See *State ex rel. List v. County of Douglas*, 90 Nev. 272, 524 P.2d 1271, 1277 (1974); *People ex rel. Younger v. County of El Dorado*, 5 Cal.3d 480, 487 P.2d 1193, 1210, 96 Cal.Rptr. 553 (1971).

TRPA's case for absolute immunity is no stronger than that of city councils and county boards of supervisors, which have been given only qualified immunity in the decisions of other Circuits, and the school board that was given only a qualified immunity by this Court in *Wood, supra*. See pp. 33-34, above. Like them, it is made up chiefly of local officials, is financed by local government, and exercises its limited powers in a localized area. If TRPA is a "regional legislature", then these boards and councils are "local legislatures" entitled to the same absolute protection. But TRPA's case for absolute immunity is actually weaker than theirs. Their members are at least elected, while TRPA's are only appointed and thus are not subject to scrutiny by the voters as an "ultimate reliance for discouraging or correcting . . . abuses."

TRPA's governing body is, in short, no more than an appointed administrative body, like many thousands of other administrative bodies at all levels of government. Extension of absolute immunity to its members is an in-

vitation to these subordinate officials to trample individual rights with impunity, secure in the knowledge that the citizens whose rights they invade have no remedy. Neither precedent nor policy justifies an extension of this extraordinary protection to the members of TRPA's governing body. Like the school board members in *Wood v. Strickland,* they should be governed by the general rule of qualified immunity this Court carefully defined in that case. The Court of Appeals' decision should be reversed.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment of the court below should be reversed as to those issues and the case remanded for further proceedings in the District Court.

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Respectfully submitted,

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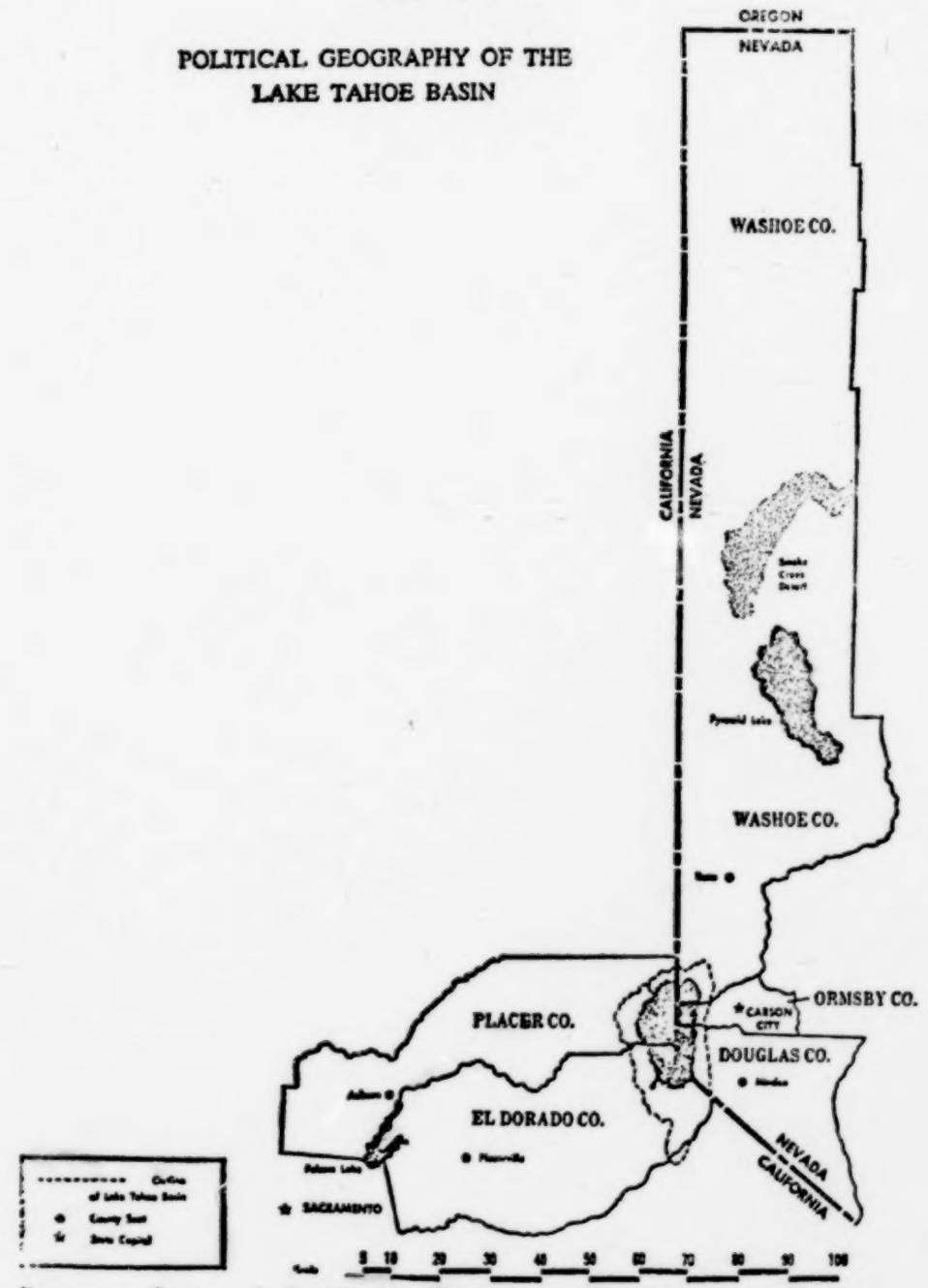
(Appendix follows)

Appendix A

POLITICAL GEOGRAPHY OF THE LAKE TAHOE BASIN



SOURCE: State of California Report to the Secretary of the Interior, Protection of the Lake Tahoe Environment, reprinted in S. Rep. No. 91-510, 91st Cong., 1st Sess., 17.